

**SUPREME COURT OF UNITED STATES**

**October Term, 1914.**

**No. 412.**

**AMERICAN WATER SOFTENER CO.,**

**Appellant,**

**vs.**

**J. D. LANKFORD, A. D. KENEEDY, W. F.**

**BARBER, AND JOHN J. GERLACH,**

**Composing the State Banking Board of the  
State of Oklahoma, et al.,**

**Appellees.**

**BRIEF OF APPELLEES.**

**APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES FOR THE  
EASTERN DISTRICT OF  
OKLAHOMA.**

**Chas. West,**

**Attorney General of Oklahoma,  
Solicitor for Appellees.**

**Service accepted this \_\_\_\_\_ day of \_\_\_\_\_, 1914**

**Attorney for Appellant.**

**SUPREME COURT OF UNITED STATES**

**October Term, 1914.**

No. 418.

AMERICAN WATER SOFTENER CO.,

Appellant,

vs.

J. D. LANKFORD, A. D. KENEDY, W. F.  
BARBER, AND JOHN J. GERLACH,  
Composing the State Banking Board of the  
State of Oklahoma, et al.,

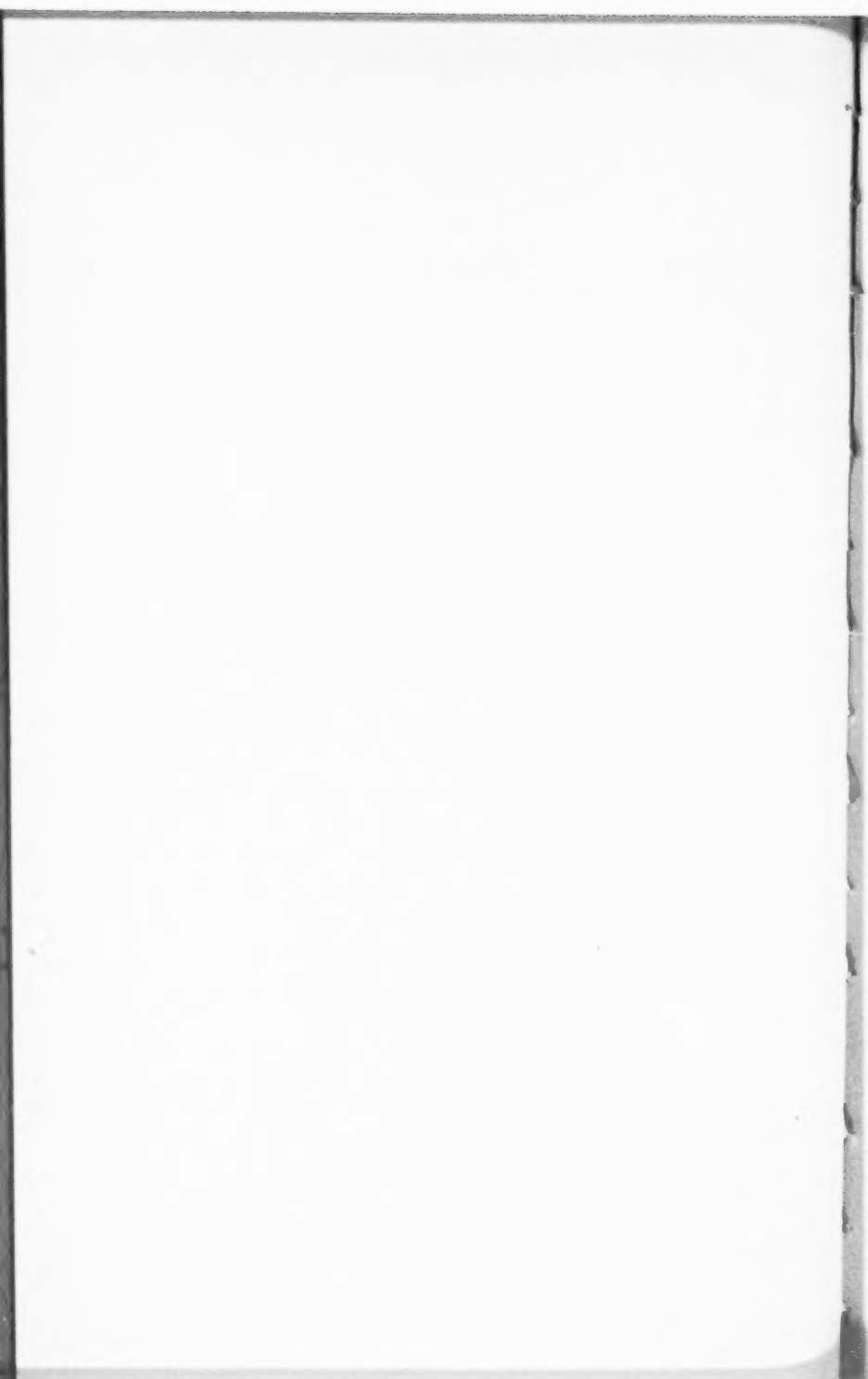
Appellees.

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**BRIEF OF APPELLEES.**

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APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES FOR THE  
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OKLAHOMA.



### **The Oklahoma Bank Guaranty Law.**

"That the Banking Board shall be composed of the Bank Commissioner and three other persons, which persons shall be appointed by the Governor, by and with the advice and consent of the Senate, no one of whom shall be an officer or director in a national bank. Said three members shall hold office concurrently with the Governor, and as soon as said members are appointed under the provisions of this act, the Board shall select one of its members as treasurer. Said appointments shall be made within ten days after the passage and approval of this act. The members of the board, other than the Bank Commissioner, shall receive no compensation for their services, and they shall be paid their actual and necessary expenses incurred in the performance of their duties, the same to be paid out of the General Revenue Fund. The Bank Commissioner shall be chairman of said board. Said board shall have the supervision and control of the Depositors' Guaranty Fund, and shall have the power to adopt all necessary rules and regulations not inconsistent with law, for the management and administration of said fund."

Section 1, Chapter 22, Session Laws of Oklahoma,, 1913, page 23.

"The Bank Commissioner and members of the Banking Board shall, before entering upon the discharge of their duties, take and subscribe to the usual oath of office. The Bank Commissioner shall execute to the

State of Oklahoma a bond in the sum of twenty-five thousand dollars with sufficient surety for the faithful performance of his duty. Each of said members of the Banking Board shall execute a bond to the State of Oklahoma, in the sum of five thousand dollars, with sufficient surety for the faithful performance of his duty, said bonds to be approved and filed as provided by law."

Section 2, *idem*, page 25.

"There is hereby levied against the capital stock of each and every bank organized and existing under the laws of this state, an annual assessment equal to one-fifth of one per cent, and no more, of its average daily deposits during its continuance as a banking corporation for the purpose of creating a Depositors' Guaranty Fund, provided, that the State Banking Board, in their discretion, may levy an additional special assessment of one-fifth of one per centum, as provided herein, during the fiscal year ending June 30, 1914; June 30, 1915; and June 30, 1916. Such fund so created shall be known as the Depositors' Guaranty Fund of the State of Oklahoma, and shall be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in this act. \* \* \* Such assessments shall be paid by cashier's checks, which checks shall be held by the Banking Board until in its judgment it is necessary to collect the same, but such checks shall not bear interest during the time they are so held."

Section 6, *idem*, page 27.

"If at any time the Depositors' Guaranty Fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against the same, the Banking Board shall have authority to issue certificates of indebtedness to be known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' in order to liquidate the deposits of failed banks, or any other indebtedness properly chargeable against said Depositors' Guaranty Fund. \* \* \* As rapidly as the assets of failed banks are liquidated and realized upon by the Bank Commissioner, the proceeds thereof, after deducting the expenses of liquidation, shall be paid to the State Banking Board, and by said board credited to the Depositors' Guaranty Fund."

Section 6, *idem*, pages 29 and 30.

"In the event that the Bank Commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said Banking Board shall draw from the Depositors' Guaranty Fund and from additional assessments, if required, as provided in Section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the Depositors' Guaranty Fund, a first lien upon the assets of said bank or

trust company, and all liabilities against the stockholders, officers, and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the Depositors' Guaranty Fund."

Section 303, Revised Laws of Oklahoma,  
1910, page 86.

## ARGUMENT.

The argument of counsel for appellant in this case proceeds, we think, upon two erroneous assumptions: First, that the Depositors' Guaranty Fund is not a fund of the State of Oklahoma; and, second, that the Banking Board performs merely a ministerial duty in determining who are entitled to payment from that fund.

We shall attempt in this brief, to show that both of these premises are wrong, and, therefore, the conclusion which appellant reaches, namely that this suit is not against the State, is erroneous.

### **The Depositors Guaranty Fund is a State Fund.**

"The Depositors' Guaranty Fund of the State of Oklahoma," is created by the levy of an assessment upon the capital stock of every state bank. The "supervision and control" of it is placed in the State Banking Board. It can be used solely for the purpose of liquidating deposits of failed banks, and "retiring warrants" drawn against it by the Banking Board. The assessments "shall be paid by cashier's checks, which checks shall be held by the Banking Board until in its judgment it is necessary to collect



the same." The Banking Board is appointed by the Governor, and the members give bond to the State of Oklahoma in the sum of five thousand dollars for faithful performance of their duties. (See the amendment of 1913, herein quoted.)

If the assets of a failed bank are insufficient to pay depositors, the Banking Board shall draw from this fund the amount necessary to make up the deficiency: "And the State shall have, for the benefit of the Depositors' Guaranty Fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all the persons, corporations or firms, such liabilities may be enforced by the State for the benefit of the Depositors' Guaranty Fund." (Sec. 303, Rev. Laws of Oklahoma, 1910.)

In short, the State, through its agents, the Banking Board, makes payments from the fund and the State—not the Banking Board—is given a lien upon the assets for the benefit of the fund; and the State—not the Banking Board—may enforce liabilities to the bank for the benefit of the fund.

If the State had no title to this fund—if the Banking Board were the trustees thereof, as appellant contends—it would seem that the lien upon assets and the right to enforce liabilities,

would have been given to the Banking Board and not to the State. The only theory consistent with these express provisions of the statute is that title to this fund is vested in the State. The fact that the statute expressly prohibits an advertisement to the effect that depositors are guaranteed by the State of Oklahoma only indicates the State's intention to be liable to depositors only from the Depositors' Guaranty Fund, and in accordance with the provisions of law governing the same and not otherwise.

But, the question has been directly passed upon by the Supreme Court of Oklahoma. In that case the State Examiner and Inspector sought to compel the Bank Commissioner to permit him to examine the books and records of his office, and of a bank of which he had taken charge. The Examiner and Inspector based his right to examine the same upon the provisions of a statute authorizing him to "examine the books and accounts of state officers whose duty it is to collect or disburse the funds of the State or under its management." Answering the question of whether or not the Bank Commissioner was such an officer, the Court said:

"That the Bank Commissioner is a State officer has not been and can not be questioned. That the Depositors' Guaranty fund, and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of

re-imbursing the Depositors' Guaranty Fund is as much a fund of the state as the common school fund, is also true. The Depositors' Guaranty Fund act was sustained by this court on the theory of the reserve power of the State to alter and amend charters of State banking corporations for the public welfare of the people of the State. \* \* \* This power exercised for the public welfare by the legislative act which causes to be levied the assessment 'against the capital stock of each and every bank or trust company organized or existing under the laws of this state \* \* \* equal to five per centum of its average daily deposits during its continuance in business as a banking corporation' for the purpose of protecting the depositors of such banks \* \* \* is the same that levies or causes to be levied a tax upon the property within the State for the maintenance and support of the common schools and educational institutions. The title to such Depositors' Guaranty Fund vests in the State just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose. Even if it were not a State fund, it would at least be a fund under the management of the State."

State ex rel Taylor vs. Cockrell, 27 Okla., 630;  
112 Pac., 1000.

The first premise of appellant's argument, therefore, that this is not a fund of the State, must fall.

### **The Banking Board's Duties.**

The second assumption of appellant that the Banking Board's duty in paying depositors from the fund, is ministerial, is equally erroneous. As above stated, the members of this Board are officers appointed by the Governor, who give bond to the state for the faithful performance of their duties; they are given "supervision and control" of the fund, and have power "to adopt all necessary rules and regulations not inconsistent with law for the management and administration of said fund."

The law provides that in the event the Bank Commissioner shall take possession of any bank, "the depositors of said bank or trust company shall be paid in full and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge the obligations to depositors, the said Banking Board shall draw from the Depositors' Guaranty Fund and from additional assessments, if required—the amount necessary to make up the deficiency." (See Section 303, Rev. Laws of Okla., 1910.)

This court has held that the law under con-

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sideration was an exercise of the police power of the State, that its primary purpose was a public one, and the private benefits arising therefrom were only incidental.

Noble State Bank vs. Haskell, 219 U. S., 104.

The depositor, we submit has no justiceable right. He has no cause of action enforceable in a court of law. There is no contract relation between him and the State. He gives nothing for the benefit he receives from this law. The State, for the purpose of the public welfare, pays him from this fund in the event of failure of the bank. His right is solely a political right, one which the State is bound to recognize in good morals, but not one upon which he can maintain a civil suit. His right is in its nature, similar to that of one awarded a sum in settlement of claims against a foreign government. Discussing such a right, the Supreme Court of the District of Columbia said:

“\* \* \* Every nation owes to its citizens a duty to protect him against foreign injuries, and to procure for him, when considerations of the common welfare do not prevent it, indemnity for those injuries: and when the State actually intervenes for the very purpose of obtaining such indemnity for him, it recognizes that duty and assumes an obligation to see that he enjoys it. In such a case we conceive that the obligation is manifest, but in determining the remedy for its enforcement, the question

is, what is the nature of that obligation? Does it constitute a legal duty on the part of the State, or of the executive who is authorized to perform it, and establish a legal right on the part of the citizen, in the sense of those terms which is employed by the courts in the administration of municipal law? Clearly it is not an obligation of contract. It arises from a relation which needs no help from contract and cannot be strengthened by contract; that is to say, from the very relation of government and citizen. It would seem then to be merely a part of the State's *political* obligations, and to consist essentially of that general, though very binding obligation of protection, which by its very origin and constitution, the State owes to the citizen."

U. S. ex rel de la Rua vs. Bayard, 4 Mackey  
321.

In the payment of depositors the State has made the Banking Board its agents. To perform this *political* obligation on its part is the chief purpose for the existence of such a board. And its determination of who are depositors entitled to share in this fund, is final, and not reviewable in the courts. The control, the management, the administration of this fund, is vested in them, not in the courts. There is no provision in the law authorizing suits against the board by depositors. The State has designated them, and no one else, to determine who shall be paid from this state fund.

The case of *Murray vs. Wilson Distilling Co.*, 213 U. S. 150, is, we think, conclusive of this. There it was sought to compel the defendants constituting the State Dispensary Commission of the State of South Carolina to pay a claim out of the proceeds of the sale of the dispensary assets. This commission was appointed for the purpose of winding up the affairs of the State Dispensary. The act creating it provided:

"It shall be the duty of said commission to close out the entire business and property of the State Dispensary except real estate, and including stock in the several county dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due, and by paying from the proceeds thereof all just liabilities at the earliest date practicable."

Mr. Justice White, speaking for the court, said:

"The absence in the winding up act of a provision conferring authority to review in the ordinary courts of justice the action of the commission concerning claims, instead of supporting the contention that the state had abandoned all property right in the funds placed in the hands of the commission, tends to a contrary conclusion, since it at once suggests the evident purpose of the State to confine the determination of the amount of its liability to claimants, to the officers or agents chosen by the state for that purpose."

There the officers were directed to pay from the proceeds of the sale of assets of the dispensary "all just liabilities;" here, the officers are directed to pay from proceeds of the sale of assets of a failed bank and from a state fund, if necessary, all depositors. In that case, the determination of what were "just liabilities" by the Commission was conclusive; and here, we submit, the determination of who are depositors is equally so.

Of this, a claimant cannot and should not complain. As said by Mr. Justice Catron, concurring in the decision of this court, in *Decatur vs. Paulding*, 14 Pet. 497, 10 L. Ed. 559:

"Every government is deemed to be just to its citizens its executive officers equally with the judges of the courts are personally disinterested and why should not their decisions be as satisfactory and final? They must be final, in most instances, in the nature of things, and the necessities of the government \* \* \*. To permit an interference of the courts of justice with the accounts and affairs of the treasury would soon sap its very foundation; money would not be drawn out according to its own rules, nor could the Secretary of the Treasury ever inform congress of the amount needed—congress would of necessity be compelled to consult the court, not the secretary, when making appropriations."

And, in *United States vs. Guthrie*, 17 How.



303, this court said, in discussing the lack of power in the courts to compel payments of disputed claims by the Treasury Department:

“\* \* \* it would occur *a priori* to every mind that a treasury not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demand, asserted and sustained through the undefined and undefinable discretion of courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a regime, or rather such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the constitution and laws and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts in the enforcement of their views of private interests.

### THE DECISION OF THE SUPREME COURT OF OKLAHOMA

Since the foregoing part of this brief was written and printed, the Supreme Court of Oklahoma, on September 29th, decided the identical questions involved in this cause. The case was Charles W. Lovett, et al., County Commissioners of Creek County, State of Oklahoma, vs. Lankford et al, composing the Banking Board of the State of Oklahoma, No. 6059.

The opinion is given in full in the appendix to a supplemental brief filed by us in the case of J. D. Lankford et al., vs. Platte Iron Works Co., No. 381, which is to be argued with this cause.

This decision, construing the statute as vesting a discretion in the Banking Board in the payment of claims against the Depositors' Guaranty Fund, is conclusive, we think, of the questions in the case at bar.


### CONCLUSION.

Since this action seeks to compel payments of a claim out of a state fund by officers vested with discretion to determine who are entitled to payment therefrom, it must be held to be an action against the State of Oklahoma. And since it has in no way consented thereto, the court was without jurisdiction thereof under the Eleventh Amendment to the Constitution of the United States.

Respectfully submitted,

CHAS. WEST,

Attorney General of Oklahoma,

Solicitor for Appellees. 

*ante*, p. 461, and on the authority of that case the decree in this is

*Affirmed.*

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE DAY, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE LAMAR, dissenting.

For reasons expressed in the dissenting opinion in *Lankford v. Platte Iron Works Company*, this day decided, *ante*, p. 461, I am unable to concur in the opinion and judgment of the court in this case.

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